Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2022

DOROTHY S. BUCHER, HERBERT KLION, as Trustee of Klion Employees' Pension Fund and ABRAHAM WECHSLER, as Personal Representative of Plaintiff Bertha Wechsler, deceased,

Petitioners,

against

FORREST N. SHUMWAY, WILLIAM E. WALKUP, CHARLES S. ARLEDGE, BREWSTER L. ARMS, NICOLA L. CAIOLA, ANDREW J. CHITIEA, GEORGE MELAMID, ARCH MONSON, JR., ROBERT O. REYNOLDS, CLINTON R. STEVENSON, HARRY H. WETZEL, HAROLD M. WILLIAMS, JOHN O. LOGAN, HENRY J. NAVE, THE SIGNAL COMPANIES, INC., ROY T. ABBOTT, JR., CHARLES G. BLUHDORN, O.C. CARMICHAEL, JR., MARTIN S. DAVIS, JOHN N. DUNCAN, LYLE FIFE, DON F. GASTON, DAVID N. JUDELSON, JUDD LEIGHTON, FRANCIS S. LEVIEN, DAN W. MADDOX, T.H. NEYLAND, CHESTER H. ROTH, IRWIN SCHLOSS, SAMUEL J. SILBERMAN, GEORGE A. SMATHERS, HAROLD U. ZERBE and GULF & WESTERN INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Dorothy S. Bucher, Herbert Klion, as trustee of Klion Employees Pension Fund and Abraham Wechsler as Personal Representative of Plaintiff Bertha

Wechsler, deceased, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 25, 1980.

Opinions Below

The Court of Appeals issued no opinion but affirmed on the opinions of District Court Judges Tenney and Lowe. The judgment appealed from dismissed the complaint for failure to state a cause of action. Said judgment is annexed hereto as Appendix A, p. 1a.[1] Underlying the judgment was a decision by District Court Judge Charles H. Tenney entered in June, 1978 reported at 452 F.Supp 1288 (S.D.N.Y. 1978) and annexed hereto as Appendix B, pages 3a-16a holding that the complaint fails to state a cause of action under the antitrust laws, and a second decision made by District Court Judge Mary Johnson Lowe in October 1979, not yet officially reported, holding that the same complaint fails to state a cause of action under the securities laws. Judge Lowe's opinion is annexed hereto as Appendix C, pages 17a-35a. Both opinions were rendered on the original complaint in this class action, no amendment thereof having been permitted. (See pp. 15 and 16 below)

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. If two unrelated corporations are poised to engage in a bidding contest to purchase stock by means of rival tender offers, may they lawfully agree not to compete

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[1] Citation herein to pages of each appendix will appear as follows: "App. , p. ".

with each other, but instead to offer the same fixed price to the stockholding public and to divide between themselves the stock so purchased? Does such an agreement, alleged in the complaint, violate the antitrust laws?

2. Did the Court of Appeals for the Second Circuit so far sanction a departure by one of the District Court Judges (Hon. M. J. Lowe) from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision insofar as said District Court: (a) granted judgment dismissing the complaint on its face without affording Plaintiffs an opportunity to amend the complaint; (b) issued an opinion stating that Plaintiffs had been afforded an opportunity to amend the complaint when, in fact, such an opportunity was denied; (c) failed to interpret the complaint broadly as required by proper practice and in fact misinterpreted the complaint so as to justify dismissal; (d) overruled and disregarded a regulation of the Securities and Exchange Commission without mentioning it in the opinion, although its application to the case had been fully argued?

3. Under *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977), may a complaint alleging material misstatements and material failures to disclose in connection with purchases of securities be dismissed because the deceptions "essentially" constitute failures to disclose breaches of fiduciary duties?

Federal Statutes and Rules Involved

Section 1 of the Sherman Act, 15 U.S.C. (1973), *as amended* (Supp. 1980) § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person

> who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Rule 10b-5, 17 C.F.R. § 240. 10b-5, promulgated pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1971), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Item 4 to Schedule 13D, incorporated in Rule 14d-1, 17 C.F.R. § 240. 13d-101, promulgated pursuant to the Securities Exchange Act of 1934, as in effect at the relevant time, provided:

> *Purpose of the Transaction*
>
> State the purpose or purposes of the purchase or proposed purchase of securities of the issuer.

Statement of the Case

This class action was commenced in May, 1976 on behalf of present and former shareholders of The Signal Companies, Inc. ("Signal") against Signal, Gulf & Western Industries, Inc. ("Gulf & Western"), and their directors.

The dismissal was based solely on the sufficiency of the original complaint. Plaintiffs never were given discovery —their motion to compel discovery, made on September 1, 1976 was stayed pending two successive motions attacking the sufficiency of various portions of the complaint.

The complaint alleges a conspiracy to violate Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 and the Rules and Regulations promulgated thereunder, Section 1 of the Sherman Act and breaches of common law fiduciary duties.[2] A copy of the complaint is annexed hereto as Appendix D, pages 36a-46a. The targets of the conspiracy were the holders of Signal's common and convertible preferred stock.

The complaint alleges that in the spring of 1976, the stock of Signal was selling at about $16.00 per share, a price grossly below its intrinsic value,[3] making Signal an inviting target for a takeover attempt. For some time prior to April 12, 1976, the managements of Signal and Gulf & Western had been negotiating with regard to Gulf & Western's plans for a take-over tender offer. It is the theory of the complaint that in these negotiations, Gulf &

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[2] Jurisdiction in the District Court was based upon Sections 15 and 78aa of Title 15, United States Code, which grant exclusive jurisdiction to the federal courts for violation of the Sherman Act and the Securities Exchange Act of 1934, respectively.

[3] Since then the stock has split 2 for 1 and each share of split stock now sells at about $33.00, representing a four-fold increase in price.

Western stated its willingness to offer a price above $20.00 per share and Signal Management revealed that it also wished to buy Signal stock, and would outbid Gulf & Western if necessary to protect Signal management's control.

Ultimately, as the complaint alleges, Signal and Gulf & Western agreed that they would not compete with each other, but instead that each would offer a price of $20.00 per share, a price fixed by agreement between them, and that they would allocate between them the shares which would thus be purchased from the investing public. Signal would get the first 2.5 million shares tendered, and Gulf & Western would get the next 3.6 million shares tendered. By this agreement defendants avoided a tender offer contest and price competition between them. Each of them could buy Signal stock from the public at the noncompetitive price of $20.00 per share. Under the theory of the complaint this portion of the agreement between defendants violates the prohibitions of the antitrust laws against agreements not to compete and against price fixing. Judge Tenney's opinion held that the antitrust laws do not apply to buyers of stock.

The complaint also alleges that the tender offer statements prepared and mailed jointly by defendants violated the disclosure requirements of the securities laws by making material misstatements and by failing to disclose material facts. The following items of deception were alleged in the complaint and explained and amplified in the arguments presented to the Court on the motion to dismiss the complaint: (a) failure to disclose that the true purpose of the joint tender solicitation was to consolidate Signal management's control of Signal by avoiding a competitive tender offer on the part of Gulf & Western,

or others;[4] (b) that instead of stating the true purpose of the tender offer, defendants stated two false purposes;[5] (c) failure to disclose that Gulf & Western was willing to pay a higher price per share if not required to vote its shares in favor of Signal's incumbent directors and to agree not to seek control of Signal; and (d) failure to disclose that corporations other than Signal and Gulf & Western were interested in acquiring Signal and its stock, and particularly that Dresser Industries, Inc. was preparing a tender offer proposal at a higher price per share than that offered by defendants.

Relying upon *Santa Fe Industries, Inc.* v. *Green,* Judge Lowe held that the deceptions alleged in the complaint merely amounted to a failure to disclose violations of fiduciary duties and therefore were not cognizable under the securities laws. Without even mentioning S.E.C. Rule 14d-1, which specifically requires a statement of purpose in the tender offer statement, Judge Lowe held that defendants were not required to state the purpose of the transaction. In addition, Judge Lowe's opinion failed to mention plaintiffs' claim that defendants made two false statements of purpose designed to mislead investors and to cover up their true purpose.

The complaint's allegation of concealment of the fact that Gulf & Western was willing to pay a higher price than $20.00 per share for the stock was mischaracterized by Judge Lowe to be a claim of ". . . what Gulf & Western

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[4] Under SEC Rule 14d-1 in effect at the pertinent time, defendants, pursuant to Schedule 13D, were required in their tender offer statement to include the following information:

"Item 4. *Purpose of the Transaction*

State the purpose or purposes of the purchase or proposed purchase of securities of the issuer." [17 C.F.R. § 240.13d-101 (1976)]

[5] See pp. 13 and 14 below.

would have done under other circumstances.'"[6] The learned Judge's opinion failed to recognize that the complaint should be interpreted broadly, as Plaintiffs argued, to allege that as a matter of fact in the negotiations between Signal and Gulf & Western, Gulf & Western's willingness to pay more than $20.00 per share for free stock was made completely clear. Thus, the allegation of non-disclosure in the complaint refers to an actual event occuring during the course of negotiations between the defendants and not to a hypothetical state of facts as described by Judge Lowe. Notably defendants did not offer any affidavits to deny that such a higher price had been offered in the negotiations between them.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court below erroneously excludes stock tender offers from the ambit of the antitrust laws thus depriving the vulnerable investing public of a fundamental protection against agreements not to compete, price fixing, and allocation of purchases. This is an important question of first impression.

Judge Tenney's dismissal of the antitrust claim of the complaint before discovery necessarily indicates his conclusion that accepting every antitrust allegation of the complaint as true, and interpreting the language of the complaint as broadly as possible, no violation of the antitrust laws can possibly be stated. With all respect, Judge Tenney's analysis is patently erroneous, as it is based on a staggering misconception, namely, that buyers of stock of a particular issue do not compete with each other. This

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[6] App. C, p. 31a.

misconception is particularly startling when applied to rival tender offers which have been an outstanding feature of the American financial scene during the past fifteen years. The drama of competing tender offers arises from the fact that the financial stakes are enormous and the benefits of such competition to the investing public have frequently been spectacular. As any reader of the financial press knows, the incidence of competitive tender offers in recent years has provided the most brilliant display conceivable of the advantages of competition to the small participant in a free economy.[7]

Competition between two or more rival offerors has caused great and rapid escalation of the price of a stock in an ensuing bidding contest. Hundreds of millions of dollars are involved in such competition; even the rumor of an impending tender competition can send the price of an issue soaring.

Judge Tenney simply failed to recognize that the purchase by major corporations of other major corporations has become an important part of the American business scene, that such purchases are frequently accomplished through tender offers for the stock of the "target" corporation, and that competition between tender offerors

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[7] See for example the November 14, 1977 issue of *Business Week* pp. 176 *et sequitur* which describes various competitive tender offers including the competitions to acquire stock of Milgo Electronics, Babcock & Wilcox, Avis, Chemetron, and Coca-Cola Bottling of LA. In the last months of 1979 Dominion Bridge Co. and Bendix Corp. competed for millions of shares of Warner & Swasey Co., bringing a bid by Bendix on December 14, 1979 of $83 per share, a price more than $46 per share higher than the closing of the market "the day before Dominion Bridge announced its proposed tender offer in October." (*Wall St. Journal*, December 17, 1979, p. 4, col. 1). During the same period tender offer contests were underway for the shares of ERC Corporation and Wylain Corporation. (*New York Times*, January 10, 1980, p. D4 and January 11, 1980, p. D4).

is now also a normal and important part of the business scene. In failing to recognize these facts of current economic life, Judge Tenney totally missed the thrust of the complaint, and excluded stockholders from the protection of the antitrust laws at precisely the moment that they need such protection.

Plaintiffs' theory of the antitrust aspect of the conspiracy is that Signal and Gulf & Western, which were separate and unconnected corporations, each wanted to purchase many millions of dollars of Signal stock. Each of these would-be purchasers recognized that buying the number of shares it had in mind could only be accomplished practically through the mechanism of a tender offer. Each party was poised to outbid the other and had indicated to the other that it was willing to bid substantially more than $20.00 per share for millions of shares of Signal. To avoid the disadvantages to themselves resulting from their imminent price competition, they jointly fixed a price of $20.00 per share, and agreed to allocate between them the shares that would be proferred in response to their "joint" but "separate" solicitations.

The Court below erroneously decided that this agreement to destroy competition and fix price in the purchase of securities is outside the scope of the Sherman Act. Plaintiffs submit that there is nothing in the antitrust laws which would exclude rival tender offerors from their scope, nor is there the slightest reason of policy which would favor a grant to tender offerors of an exemption from the antitrust laws.

The argument that the antitrust laws inherently do not apply to shares of stock and other securities is directly contradictory to this Court's decision in *United States* v. *National Assn. of Securities Dealers,* 422 U.S. 694 (1975). In that case this Court specifically held that restrictions on the purchase or sale of mutual fund shares, including

price-fixing restrictions, were *per se* violations of the antitrust laws, except insofar as the antitrust laws might be displaced by applicable provisions of the Investment Company Act. By citing *Fashion Originator's Guild of America, Inc.* v. *FTC,* 312 U. S. 457 (1941) and *Klor's, Inc.* v. *Broadway Hale Stores, Inc.,* 359 U.S. 207 (1959) in *U.S.* v. *NASD* (422 U.S. at 729), this Court recognized that the Sherman Act prohibitions against restraint of trade are applicable to dealings in shares of stock in the same way as dealings in more tangible items such as dress fabrics and electrical appliances. *See also, United States* v. *Morgan,* 118 F.Supp. 621 (S.D.N.Y. 1953); *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975); *In Re National Assn. Securities Dealers, Inc.,* 19 SEC 424 (1945).

The complaint, which was dismissed on its face, alleged that a bidding war was blocked because the potential rivals conspired to bid at the same low price and to allocate the purchases between them. Competition was thereby destroyed. This is precisely the type of conduct which this Court condemned in *United States* v. *American Tobacco Co.,* 221 U.S. 106 (1910), in which it found illegal a consortium formed for the purpose of jointly buying tobacco and avoiding price competition between large purchasers.

Unless this Court grants certiorari it will leave standing as controlling case law a decision that the antitrust laws are not available to prevent rival tender offerors from agreeing not to compete, from jointly fixing a noncompetitive price, and from allocating between them the stock to be purchased. Thus, a significant exception will have been hacked off the fundamental rule that restraints of trade in all areas of the economy are illegal, a rule which this Court has called "a comprehensive charter of economic liberty . . ." (*Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 4) and "the Magna Carta of free enterprise" (*United States* v. *Topco Associates,* 405 U.S. 596,

610 (1972)). It seems to us that all considerations of statutory construction and economic policy require that the general rule be applied with special vigor to the area of tender offer competition. The amounts at stake are very large, and anti-competitive agreements offer tempting rewards to tender offerors. The investment public is particularly vulnerable to such tactics.

Accordingly, it is respectfully submitted that this Court should grant certiorari to determine whether the antitrust allegations in this case should have been dismissed as a matter of law.

II

The decision of the Court of Appeals—rendered without opinion—has so far sanctioned a departure from the usual course of judicial proceedings as to be cause for an exercise of this Court's power of supervision.

It appears that Judge Lowe's course of procedure grossly violated the fundamental rules applicable to motions of the type decided by her. Instead of interpreting the complaint broadly[8] she interpreted it restrictively and

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[8] It is a cardinal rule stressed repeatedly by this Court that no case is to be dismissed for pleading deficiencies so long as there is any possibility that facts exist upon which a sufficient cause of action can be pleaded. Moreover, the complaint must be given the most expansive interpretation. Not only must the facts directly stated be accepted as true, but all reasonable inferences therefrom must be accepted as true. *Conley* v. *Gibson*, 355 U.S. 41 (1957). The rule is stated by Professor Moore as follows, 2A Moore's Federal Practice, § 12.08, pages 2271 through 2274 (2d ed, 1979): "But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.* Pleadings are to be liberally construed." (Italics as in original, footnotes omitted).

artificially. The misinterpretation of the complaint was aggravated by the fact that the brief submitted to her made plaintiffs' position very clear, and also made it clear that plaintiffs wished an opportunity to amend the complaint in the event that Judge Lowe interpreted it so as not to encompass plaintiffs' theory of the case. In the face of these facts Judge Lowe denied plaintiffs any opportunity to amend the complaint, and in her opinion inaccurately suggested that she had in fact granted such an opportunity, which proved to be futile.[9]

Perhaps most astonishing was the District Court's failure to honor the rule that in considering the sufficiency of a complaint, the Court must accept all allegations as true. This was a case in which the corporate defendants had exclusive possession of all of the facts relating to the negotiations between them and to the tender offer statement. The plaintiffs had no opportunity to explore the facts by discovery. The defendants did not even offer affidavits with regard to the facts in support of their motion. Yet the District Court went outside the four corners of the complaint to examine the contents of defendants' tender offer statement and *assumed* that the disclosure therein with regard to control was truthful and complete (App. C, pp. 25a-26a).

Inconsistently, Judge Lowe ignored other portions of the tender offer statement which fleshed out and strengthened the allegations of the complaint. Purporting to comply with the requirements of S.E.C. Rule 14d-1, defendants set forth the alleged purposes in their tender offer, namely to give Signal stockholders an "opportunity" to sell their stock at a price above the current market and to provide an investment for Signal's "excess

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[9] See pp. 14-16 below.

funds".[10] The alleged purposes are set forth at page 11 of the tender offer solicitation, the relevant portion of which is annexed hereto as Appendix E, p. 47a. Obviously, these purposes set forth in the tender offer statement were false if the true purpose was that alleged in the complaint, namely to consolidate Signal management's control of Signal. Equally obvious, the function of these false statements of purpose was to disguise the true purpose.

Judge Lowe's opinion held that corporate fiduciaries are not required to disclose the purpose of their transactions. The opinion avoided the issue of whether fiduciaries are permitted to lie in a tender offer statement about the purpose of the transaction by ignoring the facts stated above although those issues were stressed in argument. Similarly, the opinion avoided dealing with the impact of Rule 14d-1 by ignoring the existence of this rule, although it too was stressed in plaintiffs' arguments and brief. Plaintiffs suggest that Judge Lowe's procedure in this regard—coupled with her interpretation of the complaint in a restrictive and inaccurate manner—had the effect of denying plaintiffs any semblance of fair consideration with regard to their serious and substantial claim.

The foregoing departures from the norms of judicial procedure were compounded by Judge Lowe's flatly erroneous statement in her opinion that she afforded plaintiffs an opportunity to amend the complaint. Apparently in writing her opinion Judge Lowe forgot her instructions given to plaintiffs' counsel on the argument of the motion to dismiss. Judge Lowe directed that the Plaintiffs submit a proposed amended complaint containing no change other than deletion of material relating solely to the antitrust portions of the complaint, which previously had been dis-

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[10] An analysis of Signal's Pro Forma Financial Statements (Appendix F) show that the claim of "excess funds" was false inasmuch as current liabilities would be increased by $32,000,000 (about two-thirds of the purchase price) in order to pay for the shares to be bought by Signal. (App. F, p. 49a).

missed by Judge Tenney. The dialogue between Court and counsel makes it completely clear that Judge Lowe did not grant Plaintiffs the right to amend the complaint in order to clarify anything, or to add any allegations, or to correct any possible insufficiencies.[11] Among other amendments which Plaintiffs wished to make to the complaint was an explicit reference to a press release in which defendants failed to disclose the control agreement between them exacted by Signal's management. A copy of the press release is annexed hereto as Appendix G, pp. 50a-51a and the discussion at argument between the Court and Plaintiffs' counsel regarding the press release is annexed hereto as Appendix H, pages 52a-56a. Although plaintiffs argued that the press release should be considered to be within the scope of the original complaint, they sought to avoid any question concerning this matter by an amendment. Judge Lowe refused permission to amend, decided the issues as though the press release were not within the ambit of the case, and stated in her opinion that she had given plaintiffs an opportunity to amend the complaint.

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[11] MR. P. MANDEL: I'd like to ask one question, your Honor. You have asked for a proposed complaint to eliminate the antitrust—

THE COURT: Yes.

MR. P. MANDEL: May I go one step further and clarify the business about the press release in that complaint?

THE COURT: I think we must take it as of the time the pleading was first before me. I don't want you to add, I just want you to clarify. That is the reason I am asking you to replead. You have your class action facts intertwined with your anti-trust, intertwined with your securities. All I am asking you is to segregate them out and give me a proposed complaint without the allegations that are now no longer viable. But don't add, because if you are adding you are doing something else.

MR. P. MANDEL: I think, your Honor, we should make that clear, because we are not being given an opportunity to amend the complaint in general, just with regard to elimination of some items.

THE COURT: That's right.

(Official transcript of argument before Judge Lowe on motion to dismiss, May 8, 1979, p. 54.)

Plaintiffs' counsel took some pains when submitting a *pro forma* amended complaint in response to these instructions to remind the Court that this was not an amended complaint such as plaintiffs would wish to draft, but was merely a document submitted in accordance with the Court's limiting instructions. In forwarding the amended complaint to Judge Lowe, counsel wrote: "This document is drafted in accordance with your direction that it be prepared as of the date of the original complaint and that the amendment should consist only of a clarifying deletion of the allegations of the original complaint which relate solely to the Sherman Act violations which were dismissed by Judge Tenney." A copy of said letter is annexed hereto as Appendix I, pp. 57a-58a.

All of these matters were pointed out to the Court of Appeals in Plaintiffs' briefs. Plaintiffs respectfully suggest that the affirmance without any opinion of such an irregular course of procedure on the part of the District Court represents a degree of inattentiveness calling for the supervision of the Supreme Court. We believe that some action or at least some comment on the part of the Court of Appeals is required when the record on appeal discloses beyond peradventure that the District Court's opinion (1) incorrectly states that an opportunity to amend the complaint had been afforded to plaintiffs and (2) interprets the complaint restrictively and unfairly so as to avoid and submerge arguments made by appellant and (3) overrules a directly applicable S.E.C. regulation stressed in plaintiffs' arguments without even mentioning it.

On the present state of the record plaintiffs have regretfully been forced to conclude that the Court of Appeals did not examine this matter with the minimum of care required to understand the foregoing facts. Apparently the Court of Appeals took Judge Lowe's opinion at face value and did not realize that the opinion misstated the record, misinterpreted the complaint, and failed to men-

tion fundamental issues (such as the application of SEC Rule 14d-1) which had been thoroughly argued and briefed by the parties. By this affirmance, without opinion, the Court of Appeals sanctioned a course of procedure by the District Court Judge which was far more unfair we suggest, than that so strongly condemned by this Court in the case of *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966) wherein this Court stated:

> "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion . . . If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Id.* at 373.

III

The writ should be granted because the decision below fundamentally misinterprets this Court's decision in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977) and conflicts with a decision in at least one other Circuit.

The opinion of Judge Lowe below holds that no deception cognizable under the securities laws is alleged when the matter concealed or misstated *also* constitutes a breach of fiduciary duties. In such a situation, the opinion below suggests that the complaint "essentially" alleges a breach of fiduciary duties. This interpretation of *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977) is directly in conflict with the interpretation of the Court of Appeals for the Fifth Circuit in *SEC* v. *Blatt*, 583 F.2d 1325 (1978) which held that a deceptive statement, which also amounted to a breach of fiduciary duties, continued to constitute a violation of securities laws within the meaning of *Santa Fe* v. *Green, supra.*

The theory of the complaint is that Gulf & Western stated a willingness to offer substantially more than $20.00 per share for Signal stock if it could buy stock without restrictions against seeking control and without obligations to vote in favor of Signal management. Plaintiffs readily concede that Signal Management committed a breach of fiduciary duties when instead of conveying this offer for a higher price to Signal stockholders, they made a deal with Gulf & Western to present a lower price of $20.00 per share in exchange for control concessions. However, we urge that the information as to Gulf & Western's expressed willingness to pay a higher price for free stock was required to be disclosed under the securities laws even though the facts also involved a breach of fiduciary duties.

Indeed, the idea that breaches of fiduciary duties are immunized from disclosure under the securities laws is inherently untenable. If directors of a corporation issue false financial statements, such an act is a breach of fiduciary duties at the time committed. If the false financial statements are later included in a tender offer statement, there can be no doubt that a federal securities law violation is then being committed, even though it could be argued, as Judge Lowe has done, that the directors have merely failed to confess the prior breach of fiduciary duties. In fact, the artificial effort to separate breaches of fiduciary duties and federal securities laws deceptions into separate categories which can never be co-existent, misinterprets the express reasoning of this Court in *Santa Fe* v. *Green, supra.*

In *Santa Fe,* this Court specifically affirmed a long line of precedents which found violations of the securities laws when breaches of fiduciary duties were accompanied by misstatements, omissions or other forms of deception. This Court also approved in *Santa Fe* a number of prior cases "in which the breaches of fiduciary duties held violative of Rule 10b-5 included *some element of deception.*" *Id.* at 474-476, n.15. (Emphasis added).

The complaint in the instant case specifically alleges elements of deception (App. D, pp. 41a-43a) yet it was dismissed. It not only states a cause of action under *Santa Fe,* but its dismissal places the Second Circuit squarely in conflict with the Fifth Circuit's decision in *SEC* v. *Blatt,* 583 F.2d 1325 (5th Cir., 1978), wherein that Court pointed out that defendants had a fiduciary duty to make a certain disclosure to stockholders, and held that the failure to make such disclosure violated the securties laws, saying:

> "The critical distinction [between *Blatt* and *Santa Fe*] comes from the full and fair disclosure provided by Santa Fe Industries to the subsidiaries shareholders at an appropriate time. *Santa Fe does not control a case in which information that would prove useful to investors is withheld."* *Id.* at 1331 (Emphasis added).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Judgment of the United States Court of Appeals for the Second Circuit.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of March one thousand nine hundred and eighty.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE THOMAS J. MESKILL,
Circuit Judge.

HONORABLE CHARLES L. BRIEANT, JR.,
District Judge sitting by designation.

79-7772

DOROTHY S. BUCHER, HERBERT KLION, as Trustee of Klion Employees' Pension Fund and ABRAHAM WECHSLER, as Personal Representative of Plaintiff Bertha Wechsler, deceased,

Plaintiffs-Appellants,

v.

FORREST N. SHUMWAY, WILLIAM E. WALKUP, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Appendix A.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby are affirmed on the opinions of Judges Tenney and Lowe.

IRVING R. KAUFMAN
Irving R. Kaufman, Chief Judge.

THOMAS J. MESKILL
Thomas J. Meskill, Circuit Judge.

CHARLES L. BRIEANT, JR.
Charles L. Brieant, Jr., District Judge.

APPENDIX B

Opinion of the United States District Court for the Southern District of New York (Hon. Charles H. Tenney, J.) granting partial judgment on the pleadings.

UNITED STATES DISTRICT COURT

SOUTHERN DSTRICT OF NEW YORK

DOROTHY S. BUCHER, HERBERT KLION, as Trustees of Klion Employees' Pension Fund, and BERTHA WECHLSER,
Plaintiffs,

v.

FORREST N. SHUMWAY et al.,
Defendants.

No. 76 Civ. 2420 (CHT).
United States District Court,

S. D. New York.

June 14, 1978.

Golden, Wienshienk & Mandel, New York City, for plaintiffs; Philip Mandel, Ralph Wienshienk, Marc Owen Mandel, Bernard Rothman, Kass, Goodkind, Wechsler & Gerstein, New York City by Stuart D. Wechsler, Samuel K. Rosen, Patricia I. Avery, New York City, of counsel.

Debevoise, Plimpton, Lyons & Gates, New York City, for defendant The Signal Companies, Inc., and certain individual named defendants; Samuel E. Gates, Lionel G. Hest, Stephen C. Muther, New York City, of counsel.

Appendix B.

Skadden, Arps, Slate, Meagher & Flom, New York City, for defendant Gulf & Western Industries, Inc. and certain individual named defendants; William P. Frank, Jonathan J. Lerner, Shepard Goldfein, Jemera Rone New York City, of counsel.

MEMORANDUM

TENNEY, District Judge.

The plaintiffs are shareholders and former shareholders of The Signal Companies, Inc. ("Signal"), one of the named defendants in this action which alleges violations of federal securities and antitrust laws and breach of fiduciary duty. The case concerns what is commonly referred to as a "friendly" tender offer for a certain number of the outstanding shares of Signal; more properly the reference to the tender offer should be in the plural since Signal itself and Gulf & Western Industries, Inc. ("Gulf & Western"), another named defendant, made simultaneous offers in a single document for a combined total of 6,400,000 shares of Signal's common stock at $20 per share. Plaintiffs charge, inter alia, that by agreeing between themselves to fix the offering price and to allocate the shares thus tendered, Signal, Gulf & Western and the other named defendants who are, variously, officers and directors of the two defendant corporations, conspired in illegal restraint of trade to acquire approximately one-third of Signal's shares "at a non-competitive price, below its fair value, and to protect the control of Signal by Signal Management." Complaint ¶ 9. They reason that this agreement deprived all Signal shareholders of a rise in the price of their shares which would otherwise have been generated if Gulf & Western and Signal had bid individually and competitively against each other and against Dresser Corporation ("Dresser"), another com-

pany which had an interest in acquiring control of Signal. They also argue that the agreement foreclosed a possibly beneficial change in Signal management. The alleged antitrust and securities law offenses cannot easily be parsed: the theory is that by agreeing to fix the price of the tender offer defendants committed a per se violation of the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and, a fortiori, omitted to state the material fact that Gulf & Western would have been a potential competitor for Signal stock at a higher price had the agreement not been made.

There are two motions presently before the Court. Plaintiffs have moved for class action certification pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rules"); for reasons discussed below that motion is denied with leave to renew. Defendants have moved under Rule 12(c) for partial judgment on the Sherman Act claims urging alternatively that the complaint fails to state a claim upon which relief can be granted and/or that plaintiffs lack standing to assert the antitrust claim. For the following reasons, defendants' motion for partial judgment on the pleadings is granted on the first ground.

The Antitrust Claim

Defendants have marshaled a number of arguments against plaintiffs' attempt to introduce onto the battleground for corporate control antitrust considerations beyond those expressed in Section 7 of the Clayton Act, 15 U.S.C. § 18 (proscribing acquisition of one corporation by another where the effect upon the consumer marketplace would be to diminish competition in a particular line of commerce pursued in a particular geographic market. *See Brown Shoe Co.* v. *United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)). In opposing what they regard as an unwarranted extension of antitrust law, defendants urge several variations on two basic themes: (1)

the commercial dynamics of a tender offer are simply outside the compass of Sherman Act concerns and (2) the Williams Act, 15 U.S.C. §§ 78n(d)-(f) (an amendment to the Securities Exchange Act of 1934 which treats tender offers) specifically contemplates combinations of purchasers like these defendants and evinces, when read with the entire '34 Act, congressional intent to immunize such concerted activity from the intrusion of the Sherman Act and to address any transgressions via securities law alone.

Plaintiffs have responded by trumpeting the sweeping interdictions of the Sherman Act against all forms of price fixing, *see United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956), and by pointing to recent Supreme Court application of antitrust analysis to certain practices of the securities industry. *E. g., Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). Plaintiffs argue that these cases demonstrate the interface between securities and antitrust law and that the "fixed price" offers in this case at least require scrutiny for possible antitrust violations. This Court disagrees.

Plaintiffs are able to gain their tenuous antitrust foothold because the Sherman Act in bold strokes forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Tracing the legislative history and purpose of the Sherman Act, the Supreme Court explained that

> [t]he end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services.

Apex Hosiery Co. v. *Leader,* 310 U.S. 469, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940). The Sherman Act may be applied where necessary to relieve sellers who, through conditions peculiar to the trades they ply, are exposed to predatory practices of purchasers who control the outlets for their goods or services. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). No matter who the victim, however, the thrust of the law is to prevent impermissible diminution of business competition in a relevant market segment of the general trade or business of the nation. *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). The Sherman Act is not applied except to "restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery Co.* v. *Leader, supra,* 310 U.S. at 495, 60 S.Ct. at 993.

The purchase and sale of shares by an investor does not fit comfortably within this definition. Much less does the mere offer to purchase. A seller of the shares of a particular issuer is not engaged in the business of selling such shares as an ongoing trade, and the offeror or consortium of offerors is not the only market for the shares. *Cf. Rothberg* v. *National Banner Corp.,* 259 F.Supp. 414 (E.D. Pa.1966) (good antitrust claim stated where market for shares completely controlled by defendants allegedly conspiring to prevent shareowner from selling to anyone). Furthermore, despite the fact that the Congress has chosen through the securities law to monitor the passage of funds attendant on many investments, the common understanding is that a share of stock is not an item of goods the competitive pricing of which is deemed essential to the free market economy protected under the Sherman Act. Indeed, except for those occasions when, for reasons of their own, tender offerors and the like are willing to pay a premium over the "going price," a share of stock is not

priced competitively, either with shares of other issuers (to which it has no relevant relationship) or with a like share of the same class and issuer at the same given moment.

The conceptual difficulty which plaintiffs seek to exploit in this case inheres in the fact that while shares of stock are not conceived of as "goods," their mode of distribution is a form of "service," the business of an industry that *is* part of a trade or commerce susceptible of antitrust analysis and sanction. Thus the Supreme Court has looked at antitrust implications in a New York Stock Exchange mandate which arbitrarily deprived independent securities dealers of essential telephone links with the central market, *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); in an exchange and member-firm practice of fixing commission rates for smaller transactions, *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); and in restricted sales and distribution of mutual funds pursuant to an agreement among investment companies and associations of broker-dealers. *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). In none of these cases was the pricing of an individual issuer's shares the subject of antitrust scrutiny; all pertained to industry-wide practices affecting some aspect of the general distribution of shares or to some unfair restraint of a business organization engaged in the brokering of shares to the public.

Although plaintiffs correctly cite the continued vitality of the principle enunciated in *Silver, supra,* 373 U.S. at 357, 83 S.Ct. at 1257, that the "Securities Exchange Act contains no express exemption from the antitrust laws" and that "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary," they

cannot likewise cite any case where the principle is applied other than to offending practices of the securities industry as such. There has been no antitrust application to deception or overreaching between the potential purchasers and sellers of publicly traded shares of a particular issuer, for as Judge Conner of this district observed: "The antitrust statute was framed to preserve normal competitive forces in interstate markets against unreasonable inhibition . . not . . . to police the performance of private contracts." *Madison Fund, Inc.* v. *Charter Co.*, 406 F.Supp. 749, 751 (S.D.N.Y.1975). In the purchase and sale of listed shares of an individual issuer, supervising the formation and execution of those contracts is a matter of securities and not antitrust law.

This Court cannot find that antitrust considerations are germane to facts such as these, just as other courts have been unable to find a Sherman Act infraction—and concomitant treble damage relief—lurking among allegations of conspiracy to manipulate or fix the price of a securities purchase. For example, in *Norman* v. *Vickers Energy Corp.*, 427 F.Supp. 1208 (N.D.Ill.1977), plaintiffs were minority shareholders of TransOcean Oil, Inc. They brought suit against the corporate majority shareholder after it had made a tender offer for all of the outstanding common shares of TransOcean. Alleging both securities and antitrust violations, plaintiffs contended that the defendant sought an impermissible monopoly in TransOcean shares and argued that securities law did not reach this allegedly improper diminution of "competition" in the shares. The antitrust claim was barred, the court stating that the mere offer to purchase could not violate the Sherman Act unless it were construed to conflict irreconcilably with the Williams Act, which implicitly sanctions tender offers. The court added that to the extent that

market manipulation was alleged, securities law provided a remedy and the antitrust claims were, at best, superfluous.

In *Schaefer* v. *First Nat'l Bank,* 326 F.Supp. 1186 (N.D. Ill.1970), *aff'd,* 509 F.2d 1287 (7th Cir. 1975), *cert. denied,* 425 U.S. 943, 96 S.Ct. 1682, 48 L.Ed.2d 186 (1976), antitrust claims were made in connection with a securities fraud scheme involving manipulation of the market price of a publicly traded issue. The court of appeals concluded that the district court had properly dismissed the antitrust claims, which were based on the theory that conspiracy to create and maintain an artificial trading price for the stock was "price fixing and . . . within the literal language of the Sherman Act." 509 F.2d at 1299. The appellate court endorsed the cumulative reasoning of the district court, which had ordered the dismissal on the grounds that: (1) the '34 Act's specific prohibition of securities price manipulation preempts the more generalized Sherman Act insofar as conduct occurs which is arguably actionable under both statutes; (2) market manipulation constitutes fraud and not the restraint of trade which is contemplated by the Sherman Act; (3) inconsistencies between the two statutes in periods of limitation, provision for attorney's fees and especially damage provisions demonstrate that Congress could not have intended securities fraud claims to be tried as a matter of restraint of trade.[1]

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[1] The plaintiffs have sought to discredit the *Schaefer* case on the ground that it erroneously interpreted the "savings clause" in the '34 Act to explicitly prohibit any claim under the Sherman Act. The statute in question, Section 28(a) of the '34 Act, 15 U.S.C. § 78bb(a), provides in pertinent part:

> The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that

(footnote continued on following page)

Appendix B.

In the absence of any authority whatever to support their position, plaintiffs in this case have sought to explain away the cases holding against their theory by distinguishing securities price fixing in the fraudulent, or market rigging sense, from securities price fixing in the anticompetitive sense, positing that securities law focuses only on the former and that the latter is thus within the ambit of antitrust law. The argument is without merit. First, the '34 Act specifically proscribes "pegging, *fixing,* or stabilizing the price" of any security registered on a national exchange. 15 U.S.C. § 78i(a)(6) (emphasis added). It is axiomatic in statutory construction that when words of familiar usage are used in a statute they should be understood in their ordinary sense. *Malat* v. *Riddell,* 383 U.S. 569, 571, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966) (per curiam); *NLRB* v. *Coca-Cola Bottling Co.,* 350 U.S. 264,

(footnote continued from preceding page)

> may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

The *Schaefer* district court concluded that because the damage limitation is found immediately after the savings clause, "only single damage remedies were to be preserved [and] [t]hus, even if there once existed a Sherman Act cause of action for market manipulation, it was not saved by the later Securities Acts." *Schaefer, supra,* 326 F.Supp. at 1192. The court then invoked the same statutory language to refuse punitive damages, stating "it is now authoritatively established that only actual, and not punitive, damages are recoverable." *Id.* at 1193.

Plaintiffs distort the precedents when they state generally that the *Schaefer* interpretation of the '34 Act damage limitation language has been "overwhelmingly repudiated by subsequent decisions." Plaintiffs' Memorandum of Law at 32. Plaintiffs are correct only on the matter of the *Schaefer* position toward punitive damages. *See, e. g., Flaks* v. *Koegel,* 504 F.2d 702, 707 (2d Cir. 1974). There has been no challenge to the first *Schaefer* hypothesis that Section 28(a) demonstrates a legislative intent to forestall treble damage remedies for activities cognizable under the '34 Act.

268-69, 76 S.Ct. 383, 100 L.Ed. 285 (1956). Moreover, the Court notes that the offense in *Gordon, supra,* the case upon which plaintiffs so heavily rely, was the industry-wide, *non*-fraudulent price fixing of commissions on exchange transactions under $500,000. Although this Court has explained that *Gordon* is totally inapposite to activity affecting the price of an individual stock, since the non-competitive evil there addressed was a practice of the securities industry as a business or trade, it is nevertheless significant that plaintiffs' concept of "non-competitive price fixing" was found in *Gordon* to be within the purview of the securities law and of the SEC. Second, plaintiffs have not merely alleged restraint of trade in this tender offer but fraud as well; their complaint alleges securities law violations and states that the undisclosed aim of the offer was to permit Gulf & Western to acquire a large position in Signal at less than fair value through the acquiescence of Signal management and in order to preserve the latter's power. Finally, plaintiffs have failed to identify the competition that was being impeded in this case. If it was competition for the common stock of Signal, then the notion is untenable, for defendants merely made an offer and other markets beyond that offer continued to flourish while it was outstanding. If it is contended that purported rival Dresser's "right to compete" for Signal stock was infringed by the combined tender offer, then only Dresser would have the right to complain of it.

Because this Court concludes that antitrust concerns do not apply in the first instance to an arrangement by two parties to purchase shares at an agreed-upon price, defendants' arguments and plaintiffs' counterarguments on the intent and pervasiveness of the securities law and on implied repeal or "superfluity" of antitrust law on these facts are now largely irrelevant. Suffice it to say that

perusal of the '34 Act—particularly those sections related to tender offer—demonstrates that the Congress fully contemplated combinations of purchasers in a tender offer such as was made here. One need look no further than the introductory discussion of the legislation known as the Williams Act which broadened the '34 Act to include control of tender offers: "The [tender] offer normally consists of a bid by an individual *or group* to buy shares of a company—usually at a price above the current market price." H.R.Rep.No.1711, 90th Cong., 2d Sess. *reprinted in* [1968] U.S.Code Cong. & Admin.News, p. 2811 (emphasis added).[2] Clearly, the "purchaser" is contemplated in the plural as well as the singular; just as clearly, the

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[2] The Congress has never directly addressed the management-strengthening technique of the combined issuer/outsider tender offer, and the legislative history of the Williams Act seems to contemplate only the traditional "hostile" takeover bid. However, the same report which explains the tender offer legislation contains a discussion of additional investor protection devices, and the theory there expressed sheds some light on the instant problem. Immediately following the section on tender offer is the rationale for a '34 Act amendment which broadens disclosure requirements when a corporation repurchases its own shares. Within this section there is specific allusion to the purpose of management in pursuing such a course, and acknowledgement that "[r]epurchase programs . . . may . . . be utilized by managements to preserve or strengthen their control by counteracting tender offers or other attempted takeovers." H.R.Rep.No.1711, *supra*, U.S.Code Cong. & Admin.News 1968 at 2814-15. Given that the Congress has explicitly recognized management's interest in preserving its own incumbency and has deemed it to be adequately dealt with by requiring full and fair disclosure to the shareholders, it does not seem antithetical to any Congressional purpose that the issuer and an outside corporation might combine to strengthen management so long as the shareholder is fully apprised of that aim. Moreover, juxtaposition of the two subjects—traditional "takeover" bid and issuer repurchase—within the same explanatory test lends support to the idea that the Congress would consider a combination purchase by issuer and outsider to be within the purview of the securities law.

price contemplated is one uniform price. Furthermore, when Congress insured that all tender offerees be treated fairly by mandating that all who accept the offer receive the highest price bid for shares during the offer, 15 U.S.C. § 78n(d)(7), it necessarily required the purchasing "group" to agree upon one price for all. This Court is unwilling to conclude that the Congress was so addlepated as to have carefully legislated regulatory procedures for an activity it elsewhere forbade in the exercise of its legislative power.

Plaintiffs argue that requiring purchasers not to discriminate between various shareholders "is an entirely different matter from saying all buyers must offer the same price as each other." Plaintiffs' Memorandum at 42. Manifestly the Williams Act requires no such thing *except* where a group of purchasers makes a bid for shares. However, when plaintiffs attempt to distinguish between "proper" and "improper" groups of buyers for purposes of tender offer, *id.* at 41, they are in statutory limbo and clearly beyond any legislative intent. By parity of plaintiffs' reasoning the offer to purchase any ongoing business at an agreed-on price by a group of persons would also be an illegal restraint of trade, and by force of any logic that theory is not only absurd but arguably one which itself fosters restraint of trade by forcing out of the investment capital marketplace any but those who have the resources to make an independent offer for control. The plain fact is that nowhere in the Williams Act is it intimated—nor could it be intimated—that the purpose of the legislation is to force up the market by requiring possible contenders for corporate control to bid competitively so that the lucky shareholder of an attractive "target" company can reap a windfall. The sole purpose of the Williams Act is to provide information to the investor so that he may make a rational decision whether or not to

tender all or part of his shares. H.R.Rep.No.1711, *supra, U.S.Code Cong. & Admin.News* 1968 at 2812-14. If he finds that fraud has tainted that decision or impermissibly impinged upon his ability to dispose of his shares in a market honestly reflective of corporate worth, then he has recourse to the securities law.

Class Action Certification

Dismissal of the antitrust claim creates serious difficulties on the subject of certifying a class for purposes of the remaining securities law and pendent fiduciary breach causes of action. The original class suggested by plaintiffs consisted of "all of the owners of common stock of the Signal Companies, Inc. . . . and of all of the owners of Signal's $1.00 and $2.20 Dividend Cumulative Convertible Preferred Stock . . . on or after April 12, 1976, other than such shareholders who are named as defendants herein." Complaint ¶ 2(b). April 12, 1976 was the date on which the joint tender offer was publicly announced; designation of the entire body of Signal shareholders on and after that date was presumably predicated on the now-discredited theory that all had a viable cause of action for impermissible restraint of trade resulting in an artifically depressed stock price. With that cause of action out of the case, the class claiming violations of Section 10(b) of the '34 Act, 15 U.S.C. § 78j(b), and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, would be limited to those who can qualify as "purchasers or sellers" within the rule of *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). By contrast, there are many more shareholders who might claim a right of action implied under Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e). It has been explicitly held that under section 14(e) "a plaintiff may gain standing if he has been injured by fraudulent activi-

ties of others perpetrated in connection with a tender offer, whether or not he has tendered his shares." *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 (5th Cir.), *cert. denied*, 491 U.S. 873, 95 S.Ct. 134,, 42 L.Ed.2d 113 (1974). In *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), however, the Supreme Court specifically declined to rule on the possibility that Congress intended to protect both tendering and nontendering shareholders under Section 14(e) of the Williams Act. *Id.* at 38-39 and n. 25, 97 S.Ct. 926.

In order for this Court to fairly assess the propriety of allowing this action to be conducted under Rule 23, it is now incumbent upon the plaintiffs to redefine the class or subclasses suing, the statutory base upon which they sue, and the damage claimed by the class or classes. The Court must also be apprised of the particular material misstatements or omission upon which the class or classes rely in charging a securities law violation, since in the original complaint the purportedly misleading omissions pertained to concealment of "anticompetitive" activity now deemed not cognizable under the Sherman Act.

Accordingly, the Court will deny at this time plaintiffs' motion for class certification under Rule 23, with leave to renew the motion in light of the Court's ruling on the motion for judgment on the pleadings.

So ordered.

APPENDIX C

Opinion of the United States District Court for the Southern District of New York (Hon. Mary Johnson Lowe, J.) dismissing the complaint for failure to state a cause of action.

DOROTHY S. BUCHER, HERBERT KLION, as Trustee of Klion Employees' Pension Fund, and BERTHA WECHSLER,
Plaintiffs,

—against—

FORREST N. SHUMWAY, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

76 Civ. 2420

APPEARANCES (See Last Page)

MARY JOHNSON LOWE, D. J.

This action arises out of separate tender offers made on April 16, 1978 by the Signal Companies ("Signal") and Gulf and Western Industries, Inc. ("Gulf & Western") to purchase Signal's common stock. The tender offers were made simultaneously in a single amount entitled "Offers to Purchase for Cash a Combined Total of 6,400,000 Shares of Common Stock of The Signal Companies, Inc., at $20 per Share Net by The Signal Companies Inc., and Gulf and Western Industries, Inc." ("The Offers to Purchase").

The complaint, which alleges violations of Sections 10(b) and 14(e) of the Securities and Exchange Act of 1934 ("the 1934 Act"), Section 1 of the Sherman Act, and breaches of common law fiduciary duties, charges that by

agreeing between themselves to fix the offering price and to allocate the shares thus tendered, Signal, Gulf & Western and the other named defendants who are, variously, officers and directors of the two defendant corporations, conspired in illegal restraint of trade to acquire approximately one-third of Signal's shares "at a noncompetitive price, below its fair value, and to protect the control of Signal by Signal managment''. Complaint ¶ 9.

Plaintiffs allege that Signal made a cash tender offer to purchase 2.5 million outstanding shares of Signal common stock at an unfair price and facilitated a "friendly" tender offer by Gulf & Western to purchase up to an additional 3.9 million shares at the same unfair price. They further allege that Signal's management gave its imprimatur to Gulf & Western's tender offer in exchange for agreements and representations by Gulf & Western which would have had the effect of perpetuating the control of Signal by Signal management. The alleged agreements were that Gulf & Western (a) would not acquire more than twenty percent of the outstanding Signal capital stock, (b) would not seek representation on Signal's Board of Directors, (c) would vote for and support Signal's incumbent Board and management, and (d) would acquire Signal shares for investment purposes and not for purposes of control.

Plaintiffs allege that pursuant to this alleged conspiracy, the defendants omitted the following material facts from the "Offers to Purchase":

1. That the "true purpose" of the tender offer was to consolidate Signal management's control of Signal.

2. That the price of $20.00 per share was below the true value of Signal shares.

3. That persons or corporations other than Signal and Gulf and Western were interested in acquiring Signal or its stock.

4. That Gulf & Western would have offered a higher price per share had it not been required to vote for Signal's incumbent directors and to support Signal management and to agree not to seek control of Signal.

The complaint also alleged that Signal's management improperly rejected "out of hand" a merger proposal made by Dresser Industries, Inc. ("Dresser") on or about April 22, 1976, six days after the Offers to Purchase were distributed. They contend that Signal failed to consider the Dresser proposal fairly and failed to negotiate with Dresser in good faith.

On June 15, 1978, Judge Tenney granted plaintiffs' motion for partial judgment on the pleadings, and dismissed plaintiffs' claims under the Sherman Act. Judge Tenney also denied plaintiffs' motion for class certification with leave to renew the motion, stating that in order for the Court to decide the issue, it was incumbent upon plaintiffs to redefine the class or subclasses suing, the statutory base upon which they sue, and the damage claimed by the class or classes.

There are two motions presently before the Court. Plaintiffs have renewed their motion for class action certification. Defendants have moved to dismiss the complaint.

Defendants argue that the plaintiffs' federal securities claims should be dismissed pursuant to Fed. R. Civ. Pro. 9(b), 11 and 12(c) and that summary judgment should be granted pursuant to Fed. R. Civ. Pro. 56. Defendants claim:

1. That plaintiffs' counsel failed to comply with F.R.C.P. Rule 11[1] in that he made no investigation to sup-

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[1] Fed. R. Civ. Pro. Rule 11 provides in relevant part:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his

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port the allegations of fraudulent omissions in the Offer to Purchase and has no factual basis for the allegations. Defendants further argue that the fraud allegations are thus based upon information and belief and are without a statement of fact to support them as is required by Rule 9(b).[2]

2. That the allegations of securities fraud fail to state a claim under Sections 10(b) and 14(e) of the Securities and Exchange Act of 1934 in light of the Supreme Court's decision in *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977), and the subsequent cases which interpret it. Defendants also contend that the alleged omitted facts were either disclosed in the Offers to Purchase or, as a matter of law, need not have been disclosed.

3. That the deposition testimony of the named plaintiffs clearly demonstrates that none of them relied on the Offers to Purchase, and that therefore, summary judgment should be granted as to their claims.

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individual name, whose address shall be stated . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.

[2] Fed. R. Civ. Pro. Rule 9(b) provides:
(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Appendix C.

Plaintiffs, in opposing the motion, argue that defendants' motions are untimely,[3] that they have adequately complied with F.R.C.P. 11 and 9(b) and that the complaint states a valid claim under the securities laws. Plaintiffs also argue that reliance is not required in a case which involves primarily a failure to disclose, and alternatively, they argue that reliance by the named plaintiffs has been demonstrated, or alternatively, that the complaint presents a factual question which precludes summary judgment at this stage of the litigation.

This Court is of the opinion that the complaint must be dismissed because it fails to state a claim under the securities law.[4]

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[3] Plaintiffs argue that defendants' Rule 12(c) motion to dismiss for failure to state a claim under the securities laws should be barred because defendants' failed to include it in their motion for partial judgment on the pleadings, filed on August 19, 1977, in which they challenged the sufficiency of the antitrust claims in the complaint. However, the Court has been directed to no authority which would preclude it from presently considering this motion. The cases cited by plaintiffs hold only that it is improper to make successive motions to dismiss the same claim because denial of the first motion establishes the law of the case with respect to the maintainability of that claim. Defendants here are not moving to dismiss a claim which has previously been held legally sufficient. Moreover, defendants state that the present motion is based on recent decisions implementing *Santa Fe* v. *Green*, which was decided by the Supreme Court on March 23, 1977. The Court is of the opinion that the motion should be entertained because it was not interposed for delay and the disposition of the case on the merits will be expedited. See, *Kincaid* v. *City of Anchorage*, 100 F. Supp. 325 (D.C. Alaska, 1951).

[4] In his memorandum opinion of June 14, 1978, Judge Tenney stated that since the alleged misleading omissions in the complaint pertained to the concealment of anti-competitive activity which he had held was not cognizable under the Sherman Act, the court

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Appendix C.

In *Santa Fe* v. *Green, supra,* the Supreme Court held that a breach of fiduciary duty without any deception, misrepresentation or nondisclosure does not violate Section 10(b) or Rule 10b-5. The Court held that in order to state a cause of action, the conduct alleged must be such that it can be fairly viewed as "manipulative"[5] or "deceptive" within the meaning of the statute. 430 U.S. at 473-74. It has since been held that given the similarity of

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"must also be apprised of the particular material misstatement or omissions upon which [plaintiffs] rely in charging a securities law violation." Plaintiffs did not thereafter serve an amended complaint nor did they submit other material to the Court which would separate out their securities claims from their antitrust claims.

In deciding this motion, this Court was similarly troubled by the difficulty in parsing out plaintiffs' securities claims from their antitrust claims dismissed by Judge Tenney, and so invited plaintiffs at oral argument to submit a proposed amended complaint which would clearly separate out their securities allegations. The proposed amended complaint which plaintiffs have submitted is identical to the original complaint filed with the exception that a few phrases and sentences have been deleted.

After considering this submission and other post-argument submissions by the parties, the Court is of the opinion that the proposed amended complaint similarly fails to state a claim for relief under the securities laws. In light of this, a formal amendment of the complaint would be futile. See *Falkenberg* v. *Baldwin,* [1977] CCH *Fed. Sec. L. Rep.* ¶ 96,086, at 91,913 (S.D.N.Y. June 13, 1977).

[5] In *Santa Fe* v. *Green, supra,* the Supreme Court noted that:

> " 'Manipulation' is 'virtually a term of art when used in connection with securities markets'. *Ernst & Ernst,* 425 U.S., at 199. The term refers generally to practices such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity . . . . Indeed, nondisclosure is usually essential to the success of a manipulative scheme. 430 U.S. at 476-77.

This Court does not construe plaintiffs' complaint to allege manipulation as the basis for its securities claims.

purpose of § 10(b) and § 14(e), the same limitation would apply in the tender offer context. *Altman* v. *Knight,* 431 F. Supp. 309, 314 (S.D.N.Y. 1977); *Berman* v. *Gerber Products Co.,* 454 F. Supp. 1310, 1316 (W.D. Mich. 1978). Thus, plaintiffs may maintain their federal securities claims under Sections 10(b) and 14(e) only if the conduct alleged is manipulative or includes some misstatement, omission or other form of deception cognizable under federal law.[6]

True Purpose.

The complaint alleges that the defendants failed to disclose that the true purpose of the transaction was to consolidate Signal management's control of Signal and to deprive the shareholders of Signal of competing offers which threatened management's control.

Similar claims have recently been dismissed in the courts of this district as not stating a federal claim. In *Altman* v. *Knight, supra,* the defendants, officers and directors of a corporation, made a defensive acquisition during a tender offer and allegedly stated that the acquisition had a legitimate business purpose when its alleged undisclosed purpose was to defeat the tender offer and to thereby preserve their own jobs. The Court, citing *Santa Fe,* held the allegations insufficient to state a claim under section

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[6] In their brief, plaintiffs appear to take the position that any allegation of nondisclosure will meet the "manipulative or deceptive" requirement of *Santa Fe* v. *Green.* However, mere invocation of the statutory language is not sufficient. The critical issue, rather, is whether the *conduct alleged* constitutes conduct which is actionable under the securities laws. See *Altman* v. *Knight, supra,* at 314; *Valente* v. *Pepsico,* 454 F. Supp. 1228 (D. Del. 1978); *Biesenbach* v. *Guenther,* 446 F. Supp. 98 (E.D. Pa. 1978) *aff'd,* 588 F.2d 400 (3rd Cir. 1978); *Hundahl* v. *United Benefit Life Ins.,* [Current Binder] CCH *Fed. Sec. L. Rep.,* ¶ 96,815, at 95, 234-35. (N.D. Tex. Feb. 8, 1979).

14(e). In *Rodman* v. *The Grant Foundation* [1978], CCH *Fed. Sec. L. Rep.* ¶ 96,599 (S.D.N.Y. 1978), Judge Pollack held that a fiduciary's alleged failure to disclose that its self interest "true purpose" in making a proxy solicitation was to maintain its own control, did not state a federal claim. See also, *Golub* v. *PPD Corp.*, 576 F.2d 759 (8th Cir. 1978); *Tyco Laboratories, Inc.* v. *Kimball*, 444 F. Supp. 292 (E.D. Pa. 1977); *Hundahl* v. *United Benefit Life Ins., supra.*

The Third Circuit Court of Appeals recently addressed the issue in *Biesenbach* v. *Guenther*, 588 F.2d 400 (3rd Cir. 1978). There, plaintiffs, minority shareholders and minority members of the Board of Directors brought a derivative action against majority members of the Board alleging that those defendants had misrepresented that certain loan transactions entered into between them and the company were in the best interests of the shareholders and the corporation. The Court held that the alleged failure by corporate directors to disclose the "true purpose" of a corporate securities transaction does not state a claim under Section 10(b). The court said that an alleged breach of a fiduciary duty cannot be transformed into a federal claim by alleging in addition, that the breach was not disclosed.

The Court said:

> [A]ppellants believe that the misrepresentations and omissions that occurred in the case were: (1). the misleading statements by defendants that the transactions were in the best interests of the shareholders and (2). the defendant's failure to disclose the true purpose behind the activites. In effect, appellants are stating that the failure to disclose the breach of fiduciary duty is a misrepresentation sufficient to constitute a violation of the Act. We refuse to adopt

this approach which would clearly circumvent the Supreme Court's holding in *Santa Fe.* As Judge Higginbotham has reiterated:

> [I]t is bemusing, and ultimately pointless, to charge that directors perpetrated a "material omission" when they failed to (a) discover and adjudged faithless motives for their actions and (b) announce such a discovery in reporting the products of their managerial efforts and judgment. The securities laws, while their central insistence is upon disclosure, were never intended to attempt any such measures of psychoanalysis or preported self-analysis. The unclean heart of a director is not actionable, whether or not it is "disclosed", unless the impurities are translated into actionable deeds or omissions both objective and external.

Lavin v. *Data Systems Analysts Inc.*, 443 F. Supp. 104 (1977) quoting from *Stedman* v. *Storer,* 308 F. Supp. 881, 887 (S.D.N.Y. 1969); see *Golub* v. *PPD Corp.*, 516 F.2d 759 (8th Cir., 1978).

588. F.2d at 402.

It should be further noted that in the instant case the Offers to Purchase did disclose the facts concerning the agreement between Signal and Gulf & Western which would have the effect of perpetuating the control of Signal Management. Paragraph 10 of the Offers to Purchase provided:

> 10. Agreement Between Signal and G&W have entered into a written agreement providing as follows: (a) Without the prior written consent of Signal, G&W will not acquire whether pursuant to its Offer or otherwise any Shares if such acquisition would result in G&W's aggregate holdings of Shares exceeding 20%

of all Shares then outstanding together with Shares then issuable upon exercise of options, conversion of convertible securities or exercise of warrants. However G&W would not be required to dispose of any such Shares if its holdings were to exceed 20% only as a result of a reduction in the number of outstanding Shares or Shares so issuable.

(b) G&W will not request that any representative of G&W be nominated or elected as a member of the Board of Directors of Signal. G&W has represented that it intends to vote for Signal's present Board of Directors and support its management and that it is acquiring the Shares solely for investment purposes, and G&W has agreed that it will not seek or exercise control directly or indirectly over Signal, its officers and directors.

The facts relating to the agreement having been disclosed, the fairness of the terms of the transaction is at most a tangential concern of the securities laws.[7]

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[7] In his decision dismissing plaintiffs' antitrust claims Judge Tenney suggested that Congress intended that a combination purchase by an issuer and an outsider with the purpose of strengthening management's control is acceptable as long as there is full and fair disclosure to the shareholders. He noted:

> The Congress has never directly addressed the management-strengthening technique of the combined issuer/outsider tender offer, and the legislative history of the Williams Act seems to contemplate only the traditional "hostile" takeover bid. However, the same report which explains the tender offer legislation contains a discussion of additional investor protection devices, and the theory there expressed sheds some light on the instant problem. Immediately following the section on tender offer is the rationale for a '34 Act amendment which broadens disclosure requirements when a corporation repurchases its own shares. Within this section there

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Appendix C.

Inadequate price.

The complaint alleges that the defendants failed to disclose that the price of $20.00 per share was below the true value of Signal shares.

Such an allegation does not state a cause of action under the federal securities laws. In *Goldberger* v. *Meridor*, 567 F.2d 209 (2d Cir. 1977), the Court recognized that after *Green*, the alleged existence of "wholly inadequate consideration" can no longer alone form the basis for Rule 10b-5 liability. In *Browning Debenture Holders Committee* v. *DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), the Court of Appeals of this Circuit held that an allegation under Section 14(a) that the directors of a corporation had breached an alleged fiduciary duty by unfairly valuing the corporation's outstanding securities does not state a federal claim under *Green*, even though plaintiffs may have a colorable claim under state law.

In *Valente* v. *Pepsico, Inc., supra*, the Court noted that an important distinction must be drawn between allegations that a defendant failed to disclose material facts concerning or underlying a transaction and an allegation that

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is specific allusion to the purpose of management in pursuing such a course, and acknowledgement that "[r]epurchase programs . . . may . . . be utilized by managements to preserve or strengthen their control by counteracting tender offers or other attempted takeovers." H.R. Rep. No. 1711, *supra*, U.S. Code Cong. & Admin. News, at 2814-15. Given that the Congress has explicitly recognized management's interest in preserving its own incumbency and has deemed it to be adequately dealt with by requiring full and fair disclosure to the shareholders it does not seem antithetical to any Congressional purpose that the issuer and an outside corporation might combine to strengthen management so long as the shareholder is fully apprised of that aim. Moreover, juxtaposition of the two subjects—traditional "takeover" bid and issuer repurchase—within the same explanatory text lends support to the idea that the Congress would consider a combination purchase by issuer and outsider to be within the purview of the securities law.

a defendant failed to disclose that the transaction itself was unfair. The Court said:

> Those post *Santa Fe* cases suggest that some, but not all, allegations of material misrepresentations and non-disclosures will state a claim under section 10(b). Allegations that a defendant failed to disclose that a transaction was unfair or that it might violate state law will not be sufficient for a section 10(b) action. However, non-disclosure of material facts concerning the transactions themselves generally will be actionable under Section 10(b).
>
> Several of the allegations filed in the complaint in this case make reference to unfairness of the tender offer price or of certain transactions. To the extent that plaintiffs complain of the failure to inform minority shareholders of the unfairness of the price offered or of the actions of Pepsico, their allegations do not state a claim under section 10(b).

Id. at 1254.

In the instant case, plaintiffs do not allege that defendants failed to disclose facts or figures underlying the valuation of the shares at $20.00. Nor do they allege that any information underlying the valuation was presented in a manner which would be misleading to shareholders. In the absence of any such allegation, the failure of defendants to state that the price was unfair does not state a claim under the securities laws.[8] *Goldberger* v. *Baker,*

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[8] Plaintiffs argue that numerous cases under the securities laws, including tender offer cases, recognize that value is a primary area of wrongful deception. However, all of the cases cited by plaintiffs involve an alleged failure to disclose facts or figures forming the basis for a valuation of stock and/or assets. *Holmes* v. *Bateson,* 583 F.2d 542 (1st Cir. 1978), [1978] CCH *Fed. Sec. L.*

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442 F. Supp. 659 (S.D.N.Y. 1977). "Even under the most narrow reading of *Green,* an allegation of deception must allege more than a mere failure to disclose the unfairness of a transaction". *See also, Altman* v. *Knight, supra.* In *Santa Fe* v. *Green, supra,* the Supreme Court noted that Rule 10b-5 was not designed to ensure the fairness of the terms of a transaction. The Court stated that the "fundamental purpose" of the Act was to implement a "philosophy of full disclosure" and "once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." 430 U.S. at 478.

Interest of Other Companies.

The complaint alleges that defendants failed to disclose in the Offers to Purchase that persons or corporations other than Signal and Gulf and Western were interested in acquiring Signal or its stock. Plaintiffs have not alleged that there were any firm offers, which were not disclosed and they have directed the Court to no authority which indicates that the defendants had a duty to disclose mere

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Rep. CCH 196, 532 (1st Cir. 1978); *Stratton Group Ltd.* v. *Sprayregen,* [1978] CCH *Fed. Sec. L. Rep.* ¶ 96,302 (S.D.N.Y. 1978); *Valente* v. *Pepsico, supra; Weeks Dredging & Construction Co.* v. *American Dredging Co.,* 451 F. Supp. 464 (E.D. Pa. 1978). In *Flynn* v. *Bass Bros. Enterprises, Inc.,* 456 F. Supp. 484 (E.D. Pa. 1978), the issue was whether a third party's valuation of the assets of the target company was material and should have been disclosed. In *Warren* v. *Bokum Resources Corp.,* 433 F. Supp. 1360 (D. N.M. 1977), the Court held that an allegation that defendants had knowledge of material inside information which they failed to disclose, which information included among other things, the true value of the company's shares, sufficiently alleged scienter for purposes of the securities laws.

None of these cases suggest that an unfair price, or failure to disclose that a price was unfair is actionable under the securities laws in the absence of some non-disclosure or deception with respect to relevant *facts.*

overtures or inquiries. A similar claim was rejected by the court in *Berman* v. *Gerber Products Inc., supra.* In that case shareholders brought a derivative action after Gerber successfully opposed a tender offer by Andersen Clayton Co. Plaintiffs alleged that the company's manager refused to negotiate with various interested companies and failed to disclose to shareholders the contacts which had been made. In dismissing the allegations, the Court held that since the contacts alleged were not firm offers, they would not be deemed to be material information required to be disclosed under section 14(e). *Id.* at 1318. The Court further found that the allegations failed to state an actionable claim under section 14(e) because they failed to meet the requirement imposed by that section that the alleged violation be "in connection with" a tender offer.[9] See *Blue Chip Stamps* v. *Manor Drug Store,* 421 U.S. 723, 731-33 (1975). The court said that any actions taken by the Board defendants with respect to mere inquiries or overtures from other companies could not be said to be "in connection with" the Andersen Clayton tender offer. 454 F. Supp. at 1318. See also *Scott* v. *Multi-Amp Corp.,* 386 F. Supp. 44, 65 (D.N.J. 1974).

The law imposes no obligation upon the defendants to disclose mere inquiries or contacts made by those interested in acquiring the corporation or its stock. Plaintiffs' allegation that defendants failed to disclose any such contacts fails to state a claim under the securities laws.

Possibility of A Higher Price.

Plaintiffs' allegation that the Offers to Purchase failed to disclose that Gulf & Western would have offered a

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[9] "In order to meet this requirement, the deceptive practice must 'touch' and exist in reasonably close proximity to the purchase or sale." *Valente* v. *Pepsico, supra,* at 1236.

higher price per share if they had not been required to vote for Signal's incumbent directors and to support Signal management also fails to state a claim under the securities laws. In *Rodman* v. *The Grant Foundation, supra,* the plaintiff alleged that certain proxy statements failed to disclose that the purchase price fixed in certain Stock Purchase Agreements was more than what would have been received in an arms-length sale if the market were subjected to sale of the shares owned by the sellers. In dismissing the claim, Judge Pollack said that "[s]uch a statement would have amounted to little more than speculation unnecessary for full disclosure of the terms of the transaction contemplated by the Agreement." *Id.,* at 94,558. Plaintiffs have offered no legal authority to support an argument that defendants had a legal duty to disclose what Gulf & Western would have done under other circumstances.

Price Fixing.

The complaint alleges that Signal and Gulf & Western agreed not to bid against each other, that both would offer the same price of $20.00 per share for Signal shares. Although Judge Tenney dismissed the allegation as not stating a claim under the antitrust laws, plaintiffs now argue that the allegations state a claim under the securities laws. However, it appears to this Court that Judge Tenney disposed of this issue in his memorandum opinion of June 14, 1978 when he stated that the Williams Act, which broadened the 1934 Act to include control of tender offers fully contemplated the type of tender offer made in this case:

> Because this Court concludes that antitrust concerns do not apply in the first instance to an arrangement by two parties to purchase shares at an agreed upon price, defendants' arguments and plaintiffs' counter-

arguments on the intent and pervasiveness of the securities law and on implied repeal or "superfluity" of antitrust law on these facts are now largely irrelevant. Suffice it to say that perusal of the '34 Act—particularly those sections related to tender offer—demonstrates that the Congress fully contemplated combinations of purchasers in a tender offer such as was made here. One need look no further than the introductory discussion of the legislation known as the Williams Act which broadened the '34 Act to include control of tender offers: "The [tender] offer normally consists of a bid by an individual *or group* to buy shares of a company usually at a price above the current market price." H.R. Rep. No. 1711, 90th Cong. 2d Sess., reprinted in [1968] U.S. Code Cong. & Admin. News 2811 (emphasis added)." Clearly, the "purchaser" is contemplated in the plural as well as the singular; just as clearly, the price contemplated is one uniform price. Furthermore, when Congress insured that all tender offerees be treated fairly by mandating that all who accept the offer receive the highest price bid for shares during the offer, 15 U.S.C. § 78n(d)(7), it necessarily required the purchasing "group" to agree upon one price for all. This Court is unwilling to conclude that the Congress was so addlepated as to have carefully legislated regulatory procedures for an activity it elsewhere forbade in the exercise of its legislative power.

Although price-fixing may, in some instances be cognizable under section 9(9) of the 1934 Act,[10] the complaint in this case does not allege a violation of that statute. Also, any agreement to bid at the same price could not be deemed a failure to disclose material information under section

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[10] See 15 U.S.C. § 78i(a)(b)(1934).

10(b) and Rule 10(b)(5) because the Offers to Purchase clearly disclosed that Signal and Gulf & Western were seeking to purchase stock at the same price, and thus, is absent the non-disclosure or deception required for a cause of action under section 10(b) and Rule 10(b)(5).

The Dresser Proposal

Plaintiffs allege that Signal's management rejected the April 22, 1976 proposal by Dresser to acquire Signal stock without considering the proposal fairly. In the absence of any allegation of deception or non-disclosure with respect to the fact that the offer was made and rejected, the bare allegation does not state a cause of action under the securities laws. *Santa Fe* v. *Green, supra.*

This Court is of the opinion that the essence of the complaint in this case is that Signal Management, aided by Gulf & Western treated plaintiffs unfairly—that the primary motivation of Signal management was to entrench itself in control of Signal, and, in order to effectuate that purpose, Signal agreed with Gulf & Western to purchase Signal shares from the stockholders at an unfair price. It is essentially an allegation that Signal, aided by Gulf & Western, breached fiduciary duties owed to plaintiffs and then failed to disclose these alleged breaches in the "Offers to Purchase".

Common law breach of fiduciary duty cannot be transformed into manipulative or deceptive devices so as to state a cause of action under sections 10(b) or 14(e) simply by alleging that the defendants failed to disclose the alleged breaches. *Biesenbach* v. *Guenther, supra.* Although plaintiffs may indeed have asserted claims for which the state law provides a remedy, the Court is of the opinion that the transaction, if carried out as alleged in the complaint, was neither deceptive nor manipulative within the meaning of section 10(b), Rule 10b-5 or section 14(e). Therefore

claims asserted under those sections of the securities laws must be dismissed.

The complaint also alleges common law claims for breach of fiduciary duty. However, in light of the dismissal of the federal securities claims, the Court declines to exercise jurisdiction to hear and determine plaintiff's pendent claims. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).

In light of this decision, the Court need not decide plaintiffs' renewed motion for class certification.

Defendants' motion to dismiss pursuant to Fed. R. Civ. Pro. 12(c) is granted. The complaint is dismissed.

It is so ordered.

Dated: October 11, 1979
New York, New York

MARY JOHNSON LOWE
UNITED STATES DISTRICT JUDGE

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Appendix C.

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APPENDIX D

Complaint, filed May 23, 1976.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Judge Tenney
76 Civ. 2420
Complaint
Class Action
Plaintiffs Demand
Trial by Jury

DOROTHY S. BUCHER, HERBERT KLION, as Trustee of Klion Employees' Pension Fund and BERTHA WECHSLER,
Plaintiffs,

against

FORREST N. SHUMWAY, WILLIAM E. WALKUP, CHARLES S. ARLEDGE, BREWSTER L. ARMS, NICOLA L. CAIOLA, ANDREW J. CHITIEA, GEORGE MELAMID, ARCH MONSON, JR., ROBERT O. REYNOLDS, CLINTON R. STEVENSON, HARRY H. WETZEL, HAROLD M. WILLIAMS, JOHN O. LOGAN, HENRY J. NAVE, THE SIGNAL COMPANIES, INC., ROY T. ABBOTT, JR., CHARLES G. BLUHDORN, O. C. CARMICHAEL, JR., MARTIN S. DAVIS, JOHN N. DUNCAN, LYLE FIFE, DON F. GASTON, DAVID N. JUDELSON, JUDD LEIGHTON, FRANCIS S. LEVIEN, DAN W. MADDOX T. H. NEYLAND, CHESTER H. ROTH, IRWIN SCHLOSS, SAMUEL J. SILBERMAN, GEORGE A. SMATHERS, HAROLD U. ZERBE and GULF & WESTERN INDUSTRIES, INC.,
Defendants.

Plaintiffs by their attorneys, Golden, Wienshienk & Mandel, and Kass, Goodkind, Wechsler & Gerstein of

counsel, allege the following upon information and belief, except paragraphs 1 and 2, which are alleged upon knowledge.

Jurisdictional Allegations

1. (a) The jurisdiction of this Court is based upon 15 U.S.C.A. Section 78aa, 28 U.S.C. Section 1337, and upon principles of pendent jurisdiction.

(b) Plaintiffs allege that defendants violated Sections 10 (b) and 14 (e) of the Securities Exchange Act of 1934 (15 U.S.C.A. Section 78a *et seq.*, hereinafter referred to as "the 1934 Act") and regulations issued thereunder, and Section 1 of the Sherman Act, 15 U.S.C.A. Section 1, and common law fiduciary obligations to the class.

Class Action Allegations

2. (a) This action is properly maintainable as a class action under FRCP 23 (b) (1), (2), and (3).

(b) The class consists of all of the owners of common stock of the Signal Companies, Inc. (hereinafter "Signal"), and of all of the owners of Signal's $1.00 and $2.20 Dividend Cumulative Convertible Preferred Stock ("Preferred Stock") on or after April 12, 1976, other than such shareholders who are named as defendants herein.

(c) Plaintiffs are members of said class. Their claims are typical of the claims of all class members. They will fairly and adequately protect the interests of the class. Plaintiffs do not have interests in conflict with or antagonistic to the members of the class. Plaintiff, Dorothy S. Bucher owns 224 shares of Signal purchased in February 1968. Plaintiff Klion owned 546 shares of Signal common on April 12, 1976 and sold them on April 12, 1976 as a result of the wrongful acts of the defend-

ants set forth below in the substantive allegations of this complaint. Plaintiff Bertha Wechsler owned 109 shares of Signal common on April 12, 1976 and tendered them pursuant to the "Offers to Purchase" of Signal and Gulf & Western. Each of said plaintiffs owned his share at all times hereinafter mentioned.

(d) Members of the class are so numerous that joinder of all members is impractical. Signal had more than 50,000 shareholders of its common and convertible preferred stock located throughout the United States and in foreign countries. A class action is superior to other available methods for the fair and efficient adjudication of the claims set forth herein. The claims of most members of the class would be too small to justify instituting costly litigation individually. Unless this class action is maintainable such individuals will be without redress.

(e) Questions of law and fact common to the class predominate over any questions affecting individual members of the class. Common questions of fact include:

(i) Did defendants enter into a conspiracy and course of conduct by which they deprived the class members of an opportunity to benefit from a proposed exchange of their shares through a merger with Dresser Industries, Inc. (hereinafter "Dresser") or other potential bidders for Signal stock?

(ii) Did such conspiracy and course of conduct deprive members of an opportunity to benefit from an increase in the market price in their shares which would have resulted if Dresser, Gulf & Western, Signal and others had been permitted to compete freely for the acquisition of Signal through purchase of shares or merger?

(iii) Did defendants enter into a conspiracy and course of conduct under which Signal and the Signal

Management assisted Gulf & Western to buy shares of Signal stock from members of the class at prices below the real value of such stock in exchange for an agreement on the part of Gulf & Western to vote its Signal stock to help the management of Signal perpetuate itself in office?

(iv) Did defendants as part of such conspiracy cause Signal and Gulf & Western to agree that they would not compete with each other as buyers of Signal stock belonging to members of the class but would arbitrarily fix a price of $20.00 for their bids for such stock, and would allocate the market by fixing quotas for the stock which could be bought by Signal and Gulf & Western?

(v) Did defendants as part of such conspiracy cause to be issued and publicized a tender solicitation statement which contained material misstatements and failed to disclose material facts necessary to make those made not misleading?

(f) The common questions of law include:

(i) Did the acts of defendants violate the prohibition of the Sherman Act against restraints of trade by price fixing and by market division?

(ii) Did the defendants violate the provisions of Section 10 and Section 14 of the 1934 Act and the Regulations thereunder by issuing a tender solicitation statement which *inter alia* failed to disclose to members of the class that other corporations, including Dresser, were interested in acquiring Signal's shares and control of Signal; that Gulf & Western would have paid a higher price than $20.00 per share for Signal stock if not for the requirement of Signal Management that Gulf & Western agree to vote all

stock acquired by it for Signal Management and agree not to attempt to get control of Signal; that the purpose of the offers to purchase made in concert by Signal and Gulf & Western was to protect the position of Signal's encumbent management?

(iii) Did the acts of defendants violate the fiduciary duties owed to the members of the class under common law?

Substantive Allegations

3. Signal is a Delaware corporation. On and prior to April 12, 1976 defendants Shumway, Walkup, Arledge, Arms, Caiola, Chitiea, Melamid, Monson, Reynolds, Stevenson, Wetzel, Williams, Logan and Nave (hereinafter referred to as "Signal Management") were directors of Signal. In addition, defendants Shumway, Walkup, Arledge, Arms and Chitiea were officers of Signal. Signal's stock is listed on the New York Stock Exchange.

4. Gulf & Western is a Delaware corporation authorized to do business and having a principal office in the City and State of New York. On and prior to April 12, 1976 defendants Abbott, Bluhdorn, Carmichael, Davis, Duncan, Fife, Gaston, Judelson, Leighton, Levien, Maddox, Neyland, Roth, Schloss, Silberman, Smathers, and Zerbe (hereinafter referred to as "Gulf & Western Management") were directors of Gulf & Western. Gulf & Western's stock is listed on the New York Stock Exchange.

5. On and for sometime prior to April 12, 1976 the stock of Signal was selling on the New York Stock Exchange in a range between $15.87 and $16.50, which prices were substantially below the value of Signal stock, and by reason thereof Signal was a natural target for acquisition and take-over by other corporations.

6. Signal Management was aware that Dresser, Gulf & Western and other corporations were interested in acquiring or taking over Signal and that as a consequence thereof, Signal Management's control of Signal was in jeopardy.

7. It was in the interest of all of the members of the class to have full and free competitive bidding on an open market between Gulf & Western, Dresser, Signal, and all other potential acquirers of Signal or Signal stock.

8. It was likewise in the interest of all members of the class to keep open the opportunity for a change of management and to avoid a situation where the control of incumbent management was "locked in". It was the fiduciary duty of Signal Management to conduct the affairs of Signal for the benefit of the corporation and its stockholders and not for the benefit of Signal Management.

9. On and before April 12, 1976 defendants entered into a conspiracy and course of conduct in violation of the aforesaid fiduciary duties, and in violation of the 1934 Act and the Sherman Act. The purpose of such conspiracy and course of conduct was to enable Signal and Gulf & Western to buy about one third of Signal's outstanding stock at a non-competitive price, below its fair value, and to protect the control of Signal by Signal Management. The purpose of Signal and Gulf & Western were to be achieved at the expense of the stockholders of Signal, members of the class represented by plaintiffs.

10. In pursuance of such conspiracy and course of conduct the Signal Management and Gulf & Western Management caused Signal and Gulf & Western to do the following:

(a) They argeed that they would not bid against each other to purchase shares of Signal stock on the market, but instead jointly fixed a price of $20.00 per share as a bid for up to 6.4 million shares. They agreed to divide the market by channeling the first 2.5 million shares tendered to Signal, and allocating all subsequent shares tendered, up to a maximum of 3.9 million shares, to Gulf & Western. The total purchase price of such block of stock was to be about 128 million dollars, at the artificial price fixed by defendants.

(b) They agreed that Signal would aid Gulf & Western's effort to purchase such shares by sending to Signal's stockholders a joint tender solicitation statement entitled "Offers to Purchase", thereby affording the Gulf & Western proposal the *imprimatur* of the Signal Management. Gulf & Western agreed *inter alia* (i) that it would not seek to have any directors on the Signal Board, and (ii) that it would vote for Signal's board of directors and support Signal Management. Gulf & Western further agreed it would not acquire shares of Signal which would exceed 20% of all shares outstanding and issuable upon exercise of option warrants or conversion warrants.

(c) On or about April 16, 1976 they jointly issued and mailed to all stockholders of Signal a document entitled "Offers to Purchase" by which they solicited tenders of Signal common stock at $20.00 per share. Defendants failed to disclose in said "Offers to Purchase" the following material facts among others necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading:

(i) That Signal Management entered into a joint solicitation of tenders with Gulf & Western, the true purpose of which was to consolidate Signal Management's control of Signal and of depriving the stock-

holders of Signal of the benefit of competitive tender offers or merger offers which threatened Signal Management's control.

(ii) That persons or corporations other than Signal and Gulf & Western were interested in acquiring Signal or its stock.

(iii) That the price of $20.00 per share was below the true value of Signal shares.

(iv) That Gulf & Western would have offered a higher price per share if not required to vote for Signal's incumbent directors and to support Signal Management, and to agree not to seek control of Signal.

11. Thereafter on or about April 22, 1976, while the solicitation of tender offers on behalf of Signal and Gulf & Western was in progress, Dresser made a merger proposal to Signal under which Dresser would exchange three-tenths of a share of Dresser's common stock for each share of Signal's common stock. It was the duty of the management of Signal to consider the Dresser proposal fairly and in good faith to further the best interests of Signal stockholders. To that end it was the duty of Signal Management to negotiate with Dresser in good faith to attempt to improve Dresser's offer. Instead, in pursuance of the aforesaid conspiracy and course of conduct, defendants caused Signal Management to reject the Dresser proposal out of hand, and to issue public statements characterizing it as inadequate.

12. After rejection by Signal Management of the Dresser proposal, Dresser advised that its proposal was still open, but Signal Management has continued to fail to negotiate in good faith for an improvement of such

proposal, and has refused to submit the proposal to Signal's stockholders.

13. By reason of the aforesaid unlawful conspiracy, course of conduct, agreements and acts of defendants the shareholders of Signal have been injured as follows:

(a) They have been deprived of a free and open competitive market for their shares in which they could have obtained prices substantially in excess of $20.00 per share for their stock.

(b) They have been deprived of an opportunity to secure a change of management of their corporation.

(c) They have been deprived of an opportunity to secure a favorable merger with Dresser, or other companies.

(d) Some members of the class were induced to sell (by tendering or on the open market) signal stock substantially below its value by the wrongful acts complained of, including issuance of the incomplete and misleading "Offers to Purchase" propagated and distributed by defendants.

14. All of the individuals named as defendants herein participated or acquiesced in the wrongs alleged, and are liable therefore, together with the corporate defendants, as joint tort feasors.

15. In connection with the acts, course of conduct, combination, conspiracy and other wrongdoings alleged in this complaint, defendants directly and indirectly used the means and instrumentalities of interstate commerce, and of the mails and of the facilities of national securities

markets. Many of the acts complained of occurred in or about the City of New York.

16. The acts complained of had and still have a substantial direct and indirect effect upon interstate commerce.

WHEREFORE, plaintiffs demand judgment against the defendants jointly and severally:

(a) Requiring Signal Management to negotiate in good faith with Dresser or any other persons interested in acquiring or merging with Signal. Incidental thereto the Court should appoint a committee for such negotiations composed in part of attorneys for plaintiffs herein as representatives of the class.

(b) Enjoining defendants from continuing to acquire stock of Signal pursuant to their "Offers to Purchase", and enjoining them from voting any stock acquired by them pursuant to the conspiracy alleged herein for a period of five years.

(c) Awarding treble damages to each shareholder of Signal who sold his stock as a result of the aforesaid conspiracy, measured by the difference between sale price and the fair value thereof in a competitive market.

(d) Awarding to all members of the class treble damages measured by the difference between present market price of their stock and the price that would have been obtainable but for the wrongful acts of defendants.

(e) Awarding punitive damages.

(f) The costs and disbursements of this action, including counsel fees.

(g) Such other and further relief as the Court may deem just and proper.

Dated: New York, New York
May 28, 1976

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APPENDIX E

Portion of Page 11 from Offers to Purchase of Defendants Gulf & Western Industries, Inc. and The Signal Companies, Inc.

Purpose of Signal's Offer and Information with Respect to Signal and Related Matters.

Purpose of Offer. Signal is purchasing Shares pursuant to its Offer because it considers such purchase to represent the most attractive investment for its excess funds. However, while Signal believes that the Shares represent an attractive investment, the Offers will provide an opportunity for those stockholders wishing to do so to sell some or all of their Shares, depending on the number of Shares tendered, at a price in excess of the recent market. Signal is making no recommendation that any stockholder tender any or all of his Shares. Signal believes that no officer or director of Signal intends to tender his Shares. Each stockholder should make his own decision whether to tender his Shares upon a careful evaluation of the material in these Offers to Purchase. Signal advised stockholders, at the time of the tender offer made to the stockholders by Cemp Investments, Ltd. and others in August 1973 for 1,500,000 Shares, that it did not believe $23 per share was an adequate price. It advised stockholders, at the time of its own tender offer for 1,000,000 Shares in June 1974, that it was not recommending that any stockholder tender at a price of $24 per share. Both of these offers were oversubscribed, the latter offer substantially so. See "Legal Proceedings" in Signal's Annual Report on Form 10-K annexed hereto for a description of certain pending litigation relating to the latter offer. Signal has declared three 3% stock dividends since the offer by the Cemp group, and two of these dividends occurred since the offer by Signal.

APPENDIX F

Pro Forma Financial Statement of Defendant The Signal Companies Inc. (from p. 14 of the "Offers to Purchase" dated April 16, 1976).

Summary Consolidated Balance Sheets

The following data are taken from the balance sheets of Signal at December 31, 1975 and March 31, 1976. The pro forma adjustments reflect the purchase of 2,500,000 shares and assume (a) and estimated cost to Signal of $20 per share purchased excluding expenses of the purchase which are not expected to be material, and (b) that all shares purchased are common shares.

Appendix F.

	December 31, 1975	*March 31, 1976*	*(Unaudited) Pro Forma March 31, 1976 Assuming Purchase of 2,500,000 shares*
	(Dollars in thousands, except per share amounts)		
ASSETS:			
Cash and short-term investments ...	$ 113,328	$ 106,833	$ 88,833
Other current assets	1,035,173	1,015,901	1,015,901
Total current assets	1,148,501	1,122,734	1,104,734
Investments and long-term receivables	259,939	266,066	266,066
Property (net)	402,351	396,328	396,328
Other assets	56,032	46,484	46,484
Total	$ 1,866,823	$ 1,831,612	$ 1,813,612
LIABILITIES AND SHAREHOLDERS' EQUITY:			
Current liabilities	$ 442,451	$ 403,755	$ 435,755
Long-term debt	407,484	402,497	402,497
Deferred income taxes and other liabilities	118,214	120,234	120,234
Minority interest	90,341	92,578	92,578
Shareholders' equity:			
Preferred stock	53,372	52,491	52,491
Common stock	39,497	39,575	34,575
Capital in excess of par value	269,993	270,877	253,777
Retained earnings	445,381	449,605	421,705
Total shareholders' equity ...	808,243	812,548	762,548
Total	$ 1,866,823	$ 1,831,612	$ 1,813,612
NET BOOK VALUE PER COMMON SHARE	$38.22	$38.41	$41.07
Number of shares used in computing net book value per common share	19,748,536	19,787,608	17,287,608

APPENDIX G

Press Release Issued by Defendant The Signal Companies, Inc. on April 12, 1976.

NEWS RELEASE

THE SIGNAL COMPANIES, INC.

9665 Wilshire Boulevard, Beverly Hills, California 90212
(213) 278-7400

April 12, 1976 John W. Bold FOR IMMEDIATE RELEASE

Gulf & Western contact: Robert Amen
(212) 333-4401

SIGNAL AND GULF & WESTERN JOINTLY ANNOUNCE PLANNED TENDER OFFERS FOR 6.4 MILLION SHARES OF SIGNAL COMMON STOCK

The Signal Companies, Inc. and Gulf & Western Industries, Inc. today jointly announced their intention to make cash tender offers to purchase a total of 6.4 million shares of Signal common stock at $20 per share.

The announcement was made by Forrest N. Shumway, president of The Signal Companies, Inc. and Charles G. Bluhdorn, chairman of Gulf & Western Industries, Inc.

Under the terms of the proposed offers, Signal will buy the first shares tendered up to 2.5 million shares and Gulf & Western will buy the next 3.9 million shares tendered for a total of 6.4 million shares.

The 3.9 million shares purchased by Gulf & Western will represent approximately 20 per cent of Signal's outstanding capital stock.

Shumway stated that Signal was purchasing its shares because it considered it the most attractive investment for its excess funds. He noted that Gulf & Western's participation in the proposed offer will permit a larger

number of shareholders to sell at the tender price if they wish to do so. "Obviously, Gulf & Western agrees with us that the stock is an attractive investment," stated Shumway. "We are making no recommendation that any shareholder dispose of his stock, and each shareholder should make his individual decision," said Shumway. "However, shareholders wishing to dispose of their holdings can do so in the tender offer at a price in excess of the recent market," he said.

Bluhdorn stated that Gulf & Western was purchasing Signal shares solely as an investment. "We have no interest in board representation or seeking control," he said. "We think Signal is an attractive opportunity and we have great confidence in Signal's board of directors and its management. We have agreed with Signal not to acquire more than 20 per cent of their stock either now or in the future."

Lazard Freres & Co. will act as dealer manager for the proposed offers. Soliciting dealers will receive a fee of 25¢ per share for shares tendered through them.

The proposed offers will be made only by the tender offer documents which will be mailed to Signal's stockholders as soon as possible after information on Signal's first quarter earnings is available. The documents will contain important terms and conditions and other material information which should be carefully examined before any decisions are made with respect to the proposed offers.

Signal manufactures heavy-duty motor trucks through its subsidiary Mack Trucks, Inc.; manufactures aerospace products through its subsidiary The Garrett Corporation; and owns 50.5 per cent of UOP Inc., which conducts various operations in the petroleum and petrochemical industries. Gulf & Western is a diversified manufacturing and financial Company.

* * *

APPENDIX H

Pages 3 through 10 of the Official Transcript of the Oral Argument before the Honorable Mary Johnson Lowe, D.J. on Defendants' Motion to Dismiss the Complaint.

The Court: All right, Mr. Mandel.

First question I have for you:

According to the papers you have and if my statement here is in error, I'd like for you to correct it, is that Mr. Klion sold his stock on April 12th, after a telephone conversation with someone, and that the offers to purchase were not sent out until April 16th.

Are you familiar with the recent Second Circuit decision, Denny against Barber, et al., decided May 17, 1978, Docket No. 7-7561?

Mr. P. Mandel: Your Honor, it is cited in our brief, I am told. I do not remember it.

The Court: If you can tell me now what standing Mr. Klion has if he sold his stock prior to the offer of purchase in this case.

Mr. P. Mandel: Your Honor, Mr. Klion sold his stock after hearing the contents of a press release issued by the defendants as part of their conspiracy, describing the offers of purchase.

The Court: I don't want you to characterize it. I just want you to tell me the facts, because this is what my difficulty with these pleadings are. What press release?

Mr. P. Mandel: The press release is attached to our brief on this motion. It is an exhibit in the back. If your Honor has the brief before you, I think you will find it right there.

The Court: What is the date of the press release?

Mr. P. Mandel: April 12, 1978.

The Court: Will you state for me the substance of what in the press release he relied on, what it was?

Appendix H.

Mr. P. Mandel: The press release stated that Signal and Gulf & Western were making a tender offer for 6.4 million shares at $20 per share, and that this tender offer was being made to all of Signal stockholders.

The press release did not state any of the facts which we allege were likely material and should have been alledged—should have been disclosed to stockholders.

The Court: Mr. Mandel, is there any legal requirement that a press release disclose material?

Mr. P. Mandel: Yes, your Honor, there is a legal requirement.

The Court: Where does that come from?

Mr. P. Mandel: That comes from both 10b-5—

The Court: Oh, wait a minute. We are talking about a press release, not a tender offer.

Mr. P. Mandel: Yes, your Honor.

The Court: In other words, if I am going to advertise a moving picture, is there any legal requirement I put in that advertisement compliance with whatever laws there may be about moving pictures, let's say that it is for general audiences rather than for children?

Mr. P. Mandel: No, your Honor—

The Court: You're talking about a press release.

Who issued this press release?

Mr. P. Mandel: The defendants.

The Court: It was in a newspaper?

Mr. P. Mandel: Yes, I believe it was.

The Court: How does 10b-5, or where in any case is there any interpretation that a 10b-5 statement be made in a press release?

Mr. P. Mandel: Your Honor, I believe there are numerous cases in which the contents of press releases provide a basis for liability under Section 10b-5.

The Court: You cite some of those cases for me. Press release alone is what we are talking about now, not tender offer, right?

Mr. P. Mandel: Yes.

The Court: And I imagine if you make your argument succinct, I imagine it is that the press release must contain all material facts, is that right?

Mr. P. Mandel: No, your Honor. I would say this:

That a press release, which is intended to accomplish a purchase in connection—

The Court: Let's not assume a press release intends to accomplish anything but notify the financial community that there is something afoot, isn't that all a press release is?

Mr. P. Mandel: No, ma'am.

The Court: You tell me what it is.

Mr. P. Mandel: Our contention is—

The Court: I'm not talking about your contention. I am talking about what is the function of a press release in litigation such as this.

Mr. P. Mandel: A press release is a communication, and every communication, under 10b-5 or under the proxy act which induces purchases or sales of stock is actionable if it fails to state any matters which under the circumstances make the failure misleading.

The Court: Mr. Mandel, point out to me in the press release where there is any solicitation of stockholders.

Mr. P. Mandel: Your Honor is quite right, that the press release does not say in haec verba, please sell your stock. But—

The Court: All right. By inference, where in the press release is there any information showing that this was intended to be a solicitation on behalf of the defendants to have the stockholders sell their stock?

Mr. P. Mandel: Your Honor, it is a fact well known in the financial communities that the issuance of a press release immediately causes an enormous amount of sale and purchase of the stock.

The Court: Of course.

Counsel, that may be so, but if the gravamen of your claim is that your client was harmed because he acted on the basis of a press release, it seems to me that you must show that the defendants intended for your client to rely on this press release and sell his stock to his damage or to his detriment.

I cannot see that from the papers that I have before me. Therefore, I want you to tell me if there is anything in this press release that caused your client to divest himself of his stock to his detriment.

I am speaking of that in terms of whether he did it as a voluntary act because of his knowledge of the financial community, did it because he thought it was most prudent for him, rather than did it under a misunderstanding as to the terms of the tender offer.

Do you follow my problem?

Mr. P. Mandel: I think I do, your Honor.

The Court: Because one would lead to liability, one would lead to nothing.

Mr. P. Mandel: Your Honor, we have put in an affidavit of Mr. Klion which says in so many words he was caused to sell his stock—

The Court: I know, but that is a conclusory allegation. What I want to know is, what are the facts that lead to that conclusion.

Mr. P. Mandel: That allegation is a statement of fact on Mr. Klion's part.

The Court: Sir, I'm sure you understand what I mean by a conclusion. What factual showing have you made that would lead me to believe that cause and effect occurred here, that from looking at—not looking at, from being told over a phone about a press release, he sold his stock.

What was communicated to him that is directly referable to the press release which would amount to causation under a 10b-5?

Mr. P. Mandel: Your Honor, may I first say this, to make the point clear—

The Court: Yes.

Mr. P. Mandel: We believe that where omissions are the primary allegation, that no reliance need be proved—

The Court: Sir, that would be correct if you were talking about a formal tender offer. But we are not talking about a formal tender offer. We are talking about a press release.

Mr. P. Mandel: Your Honor, I believe that exactly the same thing is true of the press release. It is a communication. And if the communication fails to contain adequate information so that it is misleading in its total effect, then it is violative of the 10b-5.

The Court: Mr. Mandel, are you saying to me that the courts, the Congress, intended to make actionable under 10b-5 stockholders' claims where those claims arose out of action taken by the stockholders on the basis purely of a press release?

Mr. P. Mandel: Absolutely.

The Court: Tell me what cases hold that.

Mr. P. Mandel: The most dramatic case is Texas Sulfur, your Honor.

The Court: Give me the citation, please.

Mr. P. Mandel: All right.

Your Honor, may I suggest that, to make this most useful and most accurate, we be allowed to send you within two days a list of the cases pertaining to press releases which we think are relevant?

The Court: All right. That is a fair question. Let's move on to the next one; the Bucher claim.

APPENDIX I

Letter from Plaintiffs' Counsel to the Honorable Mary Johnson Lowe, D.J. transmitting proposed pro forma Amended Complaint.

ORegon 9-3760
Cable Address Valkress

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10 East 40th Street, New York, N. Y. 10016

May 9, 1979

Received
May 9, 1979
Chambers of

Hon. Mary Johnson Lowe
United States District Judge
United States Courthouse
Foley Square
New York, N. Y. 10007

U. S. District Court
Nov 19, 1979
S. D. of N. Y.

Re: Bucher, et al. v. Shumway, et al.
76 Civ. 2420 (MJL)

Dear Judge Lowe:

In accordance with Your Honor's directions, given during the argument, on May 8th, of the motion to dismiss, we enclose herewith the following:

Appendix I.

1. "Proposed Amended Complaint". This document is drafted in accordance with your direction that it be prepared as of the date of the original complaint and that the amendment should consist only of a clarifying deletion of the allegations of the original complaint which relate solely to the Sherman Act violations which were dismissed by Judge Tenney. We have not made other clarifying changes which we might have considered under different directions. For example, we have not made a clarifying change to indicate that the date of April 12, 1976 mentioned in the complaint relates to the joint press release issued by defendants on April 12, 1976. Nor have we made changes to clarify our contention that defendants' price fixing violates the '34 Act.

2. We enclose herewith (Enclosure 1) a list of cases on which we rely for the proposition that misrepresentations or omissions embodied in press releases may constitute violations of Rule 10b-5 and Section 14(e).

3. We enclose (Enclosure 2) a list of cases upon which we rely for the proposition that misrepresentations or omissions with regard to purpose may constitute a violation of Rule 10b-5 or Section 14(e).

A copy of this letter is being sent to all counsel.

Very truly yours,

GOLDEN, WIENSHIENK & MANDEL
By PHILIP MANDEL
Philip Mandel
A Member of the Firm

encs.